

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4)
5 Ashcroft 2000 and Garrett M. Lott, as treasurer)

MUR 5181

6 Spirit of America PAC and Garrett M. Lott, as treasurer)

7 Precision Marketing, Inc.)

8 Precision List, Inc.)
9

10 **GENERAL COUNSEL'S REPORT #2**

11
12
13 **I. ACTIONS RECOMMENDED**

14 Find reason to believe that Precision List, Inc. ("PLI") violated 2 U.S.C. § 441b(a) and
15
16 authorize a Subpoena for the Production of Documents and Answers to Interrogatories to PLI;
17 authorize subpoenas for the depositions of Garrett M. Lott, Arthur Speck, Rosann Garber,
18 and Jack Oliver; authorize Subpoenas for the Production of Documents and Answers to
19 Interrogatories to Bruce W. Eberle & Associates, Inc. and Omega List Company; and approve a
20 letter to Precision Marketing, Inc. ("PMI") regarding its motion that the Commission's reason to
21 believe finding be vacated and the matter be dismissed.

22 **II. BACKGROUND**¹

23 This matter involves an exchange of a Spirit of America PAC ("PAC") mailing list and
24 other items for the signature of then-Senator John Ashcroft on the PAC's fundraising letters.²

25 This matter also involves the subsequent use of that mailing list by Ashcroft 2000 including the
26

¹ On March 19, 2002, complainants Alliance for Democracy, Hedy Epstein and Ben Kjelshus filed a Section 437g(a)(8) suit against the Commission in the U.S. District Court for the District of Columbia. See *Alliance for Democracy v. FEC*, Civ. No. 02-CV-00527 (EGS) (D.D.C.). The Commission's motion for summary judgment on the ground that plaintiffs lack standing is pending.

² Pursuant to the written agreement discussed below, Mr. Ashcroft received mailing lists, lists of supporters of and contributors to the PAC, lists of prospective contributors to the PAC, results of polling data, and any and all other data and documentation regarding the PAC or John Ashcroft.

04-406-2531

1 apparent receipts of money by Ashcroft 2000 for rental of the mailing list. The First General
2 Counsel's Report dated July 10, 2002 ("First GC Report") analyzed the possible excessive in-
3 kind contribution from the PAC to Ashcroft 2000, the potential corporate contribution to
4 Ashcroft 2000 from PMI, a corporation renting the list, and the related potential reporting
5 violations.

6 Based on the complaint and responses, on July 23, 2002, the Commission found reason to
7 believe that the PAC and Garrett M. Lott, as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A) and
8 434(b), that Ashcroft 2000 and Garrett M. Lott, as treasurer, violated 2 U.S.C. §§ 441a(f),
9 434(b), and 441b(a), and that PMI, a vendor to both committees, violated 2 U.S.C. § 441b(a).
10 On that same date the Commission also approved Subpoenas for the Production of Documents
11 and Answers to Interrogatories to the PAC, Ashcroft 2000, and PMI.

12 **III. DISCUSSION**

13 **A. Information Gained During the Investigation Thus Far³**

14 Set forth below is a summary of significant information gained so far in this Office's
15 investigation and some of the additional questions raised thereby, centering around the agreement
16 between John Ashcroft and the PAC and the ownership and the valuation of the list. First, we
17

³ The PAC's, Ashcroft 2000's and PMI's responses to the Commission's Subpoenas for the Production of Documents and Answers to Interrogatories were limited and incomplete. (This Office has attached certain documents as set forth below; the entire responses are available in the Central Enforcement Docket). For example, although the PAC and Ashcroft 2000 disclosed extensive receipts and disbursements relating to mailing lists, neither produced documents such as receipts, invoices, and cancelled checks that are ordinarily associated with disbursements and receipts; in the event that the committees no longer possess such documents, they failed to identify such documents and explain their destruction or transfer to a third party, as requested in the subpoenas. The committees also failed to properly identify the documents they did provide, pursuant to the instructions and definitions in the Commission's subpoenas. Further, the responses included contradictory information, as discussed below. This Office sent letters to each respondent detailing the areas of non-compliance and requesting full compliance. PMI provided additional documents and information on January 8, 2003; this Office has requested that the two committees provide the additional documents and information by February 5, 2003. In addition to these follow-up letters, the proposed deposition subpoenas and the Subpoenas for the Production of Documents and Answers to Interrogatories are intended to gain the additional information.

1 have obtained the two agreements underlying the central transactions in this matter. Pursuant to
2 the Work Product Agreement between John Ashcroft and the PAC, John Ashcroft provided his
3 name and likeness for use in connection with PAC fundraising activities in exchange for the
4 resulting "work product," which under the agreement "shall include, but not be limited to,
5 mailing lists, lists of supporters of and contributors to [the PAC], lists of prospective contributors
6 to [the PAC], results of polling data, and any and all other data and documentation regarding [the
7 PAC] or John Ashcroft."⁴ Attachment 1. As noted in the First GC Report, a key issue in this
8 matter is whether the Work Product Agreement represented a bargained-for exchange of equal
9 value. The other significant agreement is the List License Agreement between John Ashcroft and
10 Ashcroft 2000, by which John Ashcroft permits Ashcroft 2000 to use ("including the right to sell,
11 transfer, assign, license or sublicense") the mailing list that this agreement describes as owned by
12 him.⁵ Attachment 2. The investigation in this matter will need to clarify the transactions that
13 took place pursuant to this agreement.

14 Second, PMI denies making payments to Ashcroft 2000 for list rental. Based in part on
15 Ashcroft 2000 disclosure reports, the Commission had found reason to believe that PMI may
16 have made payments to Ashcroft 2000 for rental, licensing or sub-licensing of the mailing list
17 under circumstances that may have resulted in a prohibited corporate contribution. See 2 U.S.C.
18

⁴ The Work Product Agreement contains within its text an effective date of July 17, 1998, although the copy provided to this Office contains signatures dated August 3 and 4, 1999. The PAC's response explains that this agreement was "originally negotiated and executed by Jack Oliver as Executive Director of Spirit of America PAC and John D. Ashcroft on July 17, 1998; however, after execution the parties did not forward the original or a copy of the signed agreement to counsel. In July, 1999, the parties realized that the originally executed document could not be located and a replacement original bearing the effective date was forwarded to the parties for execution and was subsequently executed. Neither the signed original nor any copy or facsimile copy thereof can be located."

⁵ The List License Agreement identifies John Ashcroft as the "Licensor" who "is the owner of certain items of intellectual property in the form of data constituting a mailing/contact list of individuals who have made or may potentially make monetary contributions, or otherwise provide support to Licensor."

1 § 441b; First GC Report pages 13-17. Although PMI acknowledges making some payments to
2 Ashcroft 2000 during 2000, the corporation claims the purpose of those payments was for
3 "assignment of accounts receivable".⁶ Attachment 3.⁷ This Office will attempt to clarify
4 Ashcroft 2000's use of the list and the interactions between Ashcroft 2000 and PMI.

5 Third, the available information shows extensive interactions regarding the list among the
6 PAC, Ashcroft 2000, PMI, its president Arthur Speck, and the related vendor, PLI and its
7 president Roseann Garber.⁸

8 Fourth, the available information shows that two other vendors, Bruce W. Eberle &
9 Associates, Inc. ("Eberle & Associates") and Omega List Company ("Omega"), described as a
10 parent and subsidiary, respectively, did a substantial amount of work on behalf of the PAC
11 regarding lists and mailings.⁹ The information also shows interaction including financial
12 transactions between Eberle & Associates and Omega and PMI/PLI. Attachment 4. It appears
13 that Eberle & Associates and Omega served as the primary vendors regarding the list during
14 1998.

⁶ Of the payments that PMI denies making to Ashcroft 2000 during 2000, only one was disclosed by Ashcroft 2000 with an identified purpose, \$8,882.96 on August 7, 2000 for "rental."

⁷ The five pages at Attachment 6 are taken from PMI's responses. The first page is PMI's cover letter to its October 3, 2002 response stating that the checks that PMI wrote to Ashcroft 2000 during 2000 "do not relate to the rental, licensing, or sublicensing of any Ashcroft list by [PMI]." The second and third pages of Attachment 6 are an "Assignment of Accounts Receivable" agreement dated March 31, 2000 between PMI and Ashcroft 2000. This Office notes that paragraph 1 of this agreement provides that Ashcroft 2000 assigns to PMI the committee's rights to certain accounts receivable in exchange for a payment of \$46,300.52. This figure is virtually identical to a payment of \$46,299.83 disclosed by Ashcroft 2000 as received from PMI on March 31, 2000. The fourth page of Attachment 6 is a list of documents provided by PMI in response to the Commission's subpoena; item number 4 references to the Assignment of Accounts Receivable (here referred to as "document #17"). The fifth and final page of Attachment 6 is a chart provided by PMI that lists three payments PMI states it made to Ashcroft 2000 during 2000 that total \$52,092.92.

⁸ See First GC Report page 3, footnote 3 and pages 16-17. The First GC Report's reason to believe recommendation regarding PLI was withdrawn by this Office.

⁹ The PAC disclosed disbursements to an apparently related entity, Eberle Data Center, at the same address as Eberle & Associates and Omega, for the purpose of "computer services." This Office has not located any public records regarding Eberle Data Center.

1 **B. Additional Reason-to-Believe Recommendation**

2 This Office recommends that the Commission find reason to believe PLI violated
3 2 U.S.C. § 441b(a). PLI appears to be a wholly owned subsidiary of PMI and was incorporated in
4 Virginia in 1997. Arthur Speck, President of PMI, is the registered agent for PLI and he appears to
5 work closely with PLI and its president, Rosann Garber, with respect to mailing lists and related
6 transactions.

7 **1. Law**

8 It is unlawful for any corporation to make a contribution or expenditure in connection with
9 any federal election. 2 U.S.C. § 441b(a). It is also unlawful for any officer or director of a
10 corporation to consent to any corporate expenditures which may constitute prohibited contributions
11 to candidates or committees. *Id.* For purposes of Section 441b, the term "contribution" includes
12 any direct or indirect payment, distribution, loan (other than from a national or State bank made in
13 accordance with the applicable banking laws and regulations in the ordinary course of business),
14 advance, deposit, or gift of money, or any services, or anything of value to any candidate or
15 campaign committee in connection with a Federal election. 2 U.S.C. § 441b(b)(2). "Anything of
16 value" includes all in-kind contributions, including the provision of goods or services without charge
17 or at a charge which is less than the usual and normal charge for such goods or services. 11 C.F.R.
18 § 100.7(a)(1)(iii)(A). For purposes of 11 C.F.R. § 100.7(a)(1)(iii)(A), "usual and normal charge" for
19 goods means the price of those goods in the market from which they ordinarily would have been
20 purchased at the time of the contribution.¹⁰ 11 C.F.R. § 100.7(a)(1)(iii)(B). The regulations

¹⁰ Part 100 of the Commission's regulations were renumbered last year. As a result of the renumbering, Sections 100.7(a)(1)(iii)(A) and (B) now appear in Sections 100.52(d)(1) and (2).

specifically include mailing lists as an example of such goods or services. *Id.* See also 11 C.F.R. § 100.8(a)(1)(iv)(A).¹¹ The entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution.¹² 11 C.F.R. § 100.7(a)(2).

The Commission recently considered the issue of whether the rental of a mailing list results in a contribution in Advisory Opinion 2002-14, involving the Libertarian National Committee, Inc. ("LNC"). The Commission stated that "[w]hether the LNC may lease the list to others for payment depends upon the nature of the list development and use, and on the nature of the lease transaction." Advisory Opinion 2002-14, page 6; *see also* Advisory Opinion 1989-4, 1986-14 and 1981-53 (isolated sales of committee assets without inherent contribution consequences were permitted in circumstances where the assets had been purchased or developed for the committee's own particular use rather than for sale in fundraising activity and such assets had ascertainable market value). Under the factual circumstances presented by the requestor (i.e., the committee developed the mailing list over a period of time primarily for its own political or campaign use and the lease of the list was only a small percentage of its overall use by the committee), the Commission determined that the LNC "may lease its mailing list to any person...without a contribution resulting if the following conditions are met. First, the list, or leased portion thereof, must have an ascertainable fair market value. Second, the list must be leased at the usual and normal charge in a bona fide, arm's[-]length transaction, and the list must be used in a commercially reasonable manner consistent with such an arms-length agreement." Advisory Opinion 2002-14, page 6. The Commission also stated that given these facts, the LNC

¹¹ Section 100.8(a)(1)(iv)(A) now appears at Section 100.111(e)(1).

¹² Section 100.7(a)(2) now appears at Section 100.53.

1 may exchange its mailing lists or portions of its mailing lists with any outside organizations,
2 including for-profit corporations and labor organizations, provided that the lists or portions of the
3 lists that are exchanged are of equal value. *Id.*

4 2. Analysis

5 In the matter at hand, the Commission's reason-to-believe finding that PMI may have
6 made corporate contributions to Ashcroft 2000 in violation of 2 U.S.C. § 441b(a) was based on
7 the following considerations: 1) it appeared, from information available at the time, that PMI had
8 rented or sub-licensed all or a portion of the mailing list from Ashcroft 2000 for an amount
9 totaling over \$116,922; and 2) the mailing list was developed for or by the PAC and not
10 developed by Ashcroft 2000 for its own use, and therefore, the transactions between Ashcroft
11 2000 and PMI did not meet the requirement that a mailing list be developed by a committee in
12 the normal course of its operation and for its own use in order for the sale or rental of the mailing
13 list not to result in a contribution. After obtaining additional information in the course of
14 investigating this matter, it now appears that PMI, either itself or in conjunction with PMI, rented,
15 licensed or sub-licensed the mailing list.

16 PMI states in its response to the Commission's Subpoena and Order that it "never rented
17 a mailing list from Ashcroft 2000, nor did Precision Marketing ever license or sublicense any
18 Ashcroft mailing list." (emphasis in the original) Attachment 3, page 1. PMI further states that it
19 did not make \$116,922 in payments to Ashcroft 2000 during calendar year 2000 as was reported
20 by Ashcroft 2000 in its disclosure reports, but instead made \$52,092.92 in payments to the
21 Committee in relation to an agreement between PMI and Ashcroft 2000 for an Assignment of
22 Accounts Receivable. Attachment 3, pages 1-5. According to PMI, the discrepancy between the

1 amount of payments reported by Ashcroft 2000 as having been received from PMI and the
2 amount of payments PMI indicates that it paid Ashcroft 2000 can be explained by a reporting
3 error on the part of the Committee.¹³

4 If PMI, in fact, did not make the payments, it raises the question of what entity made the
5 payments in question to Ashcroft 2000 and why the payments were reported as having been made
6 by PMI. Because the information we have obtained thus far in discovery indicates that PLI is the
7 entity more centrally involved with the mailing list and transactions regarding the list, it appears
8 likely that these payments were made by PLI but reported by Ashcroft 2000 as payments received
9 from PMI. Although PLI and PMI are set up as two separate corporate entities, PLI is apparently
10 a wholly-owned subsidiary of PMI and the two entities work closely together. PMI-submitted
11 documents indicate continual and ongoing interactions between PLI and PMI. For example, PMI
12 documents indicate that Rosann Garber, President of PLI and list manager, and Arthur Speck,
13 President of PMI, were in frequent contact via e-mail and written memoranda regarding the list.
14 Further support of the close nexus between PMI and PLI is found in PMI documents that indicate
15 PMI and PLI operate out of the same building in Falls Church, Virginia; PMI apparently is
16 located in suite 200 and PLI is apparently located in suite 201 of the building. As noted earlier,
17 Arthur Speck is the registered agent for both PMI and PLI.

18 In addition, PMI documents suggest a close nexus between PLI and PMI in the area of
19 financial transactions, including the possible commingling of funds between PLI and PMI
20 accounts. For example, two checks drawn on an operating account of vendor Omega List

¹³ This Office has requested that Ashcroft 2000 clarify the apparent discrepancy. Nonetheless, during depositions, we will continue to explore any possible involvement of PMI in any rental, licensing or sub-licensing of the mailing list.

1 Company made payable to "Precision List Co." in the amounts of \$18,539.38 and \$10,000,
2 which apparently were related to list royalties, were deposited into an account belonging to PMI
3 on April 3, 2000, rather than being deposited into a PLI account.

4 This Office further notes that receipts of list rental income from PLI and other
5 organizations are disclosed in the PAC's 1999 disclosure reports. The lack of receipts from PLI
6 on Ashcroft 2000 disclosure reports also suggests that a portion of the receipts that the
7 Committee reported as having received from PMI, and that PMI indicates it never made to
8 Ashcroft 2000, were payments made to Ashcroft 2000 by PLI related to the rental, licensing or
9 sub-licensing of the list or a portion of it.

10 In light of the close nexus between PLI and PMI, PMI-submitted financial information,
11 and the lack of receipts from PLI on Ashcroft 2000 disclosure reports, it appears that payments
12 Ashcroft 2000 reported as having received from PMI may actually reflect payments received
13 from PLI. If the mailing list was not developed by Ashcroft 2000 for its own use, any rental,
14 licensing or sub-licensing of the list by Ashcroft 2000 to PLI may have resulted in the making of
15 a corporate contribution. See 2 U.S.C. § 441b(a). Consequently, this Office recommends that
16 the Commission find reason to believe that Precision List, Inc. violated 2 U.S.C. § 441b(a).¹⁴ In
17 addition, this Office recommends that the Commission approve the attached Subpoena for the
18

¹⁴ Because the Commission previously found reason to believe that Ashcroft 2000 and Garrett Lott, as treasurer, violated 2 U.S.C. § 441b(a) based on the same legal theory, the receipt of corporate contributions, we are not making another recommendation with respect to the Committee.

Production of Documents and Answers to Interrogatories to PLI, Attachment 5.

C. Proposed Additional Discovery

1. Deposition Subpoenas

In order to explore further the facts of this case, this Office now recommends the approval of deposition subpoenas for the individuals listed below, who held positions with the PAC, Ashcroft 2000 and the vendors involved in the list transactions. Their testimony should help establish exactly what the parties to these transactions exchanged and, more specifically, whether (1) the licensing and subsequent rental of the list were arms-length transactions for fair market value and (2) the list rented out by Ashcroft 2000 was developed for its own political or campaign use. Testimony should also help resolve apparent contradictions in the information obtained to this point.

- **Garrett M. Lott**, current treasurer of both respondent committees; served as Executive Director of the PAC starting on January 1, 1999; signatory to the List License Agreement dated January 1, 1999 as the comptroller of Ashcroft 2000; documentation shows that Mr. Lott was involved in various transactions regarding the mailing list.
- **Jack Oliver**, Executive Director of the PAC prior to January 1, 1999; signatory to the Work Product Agreement on behalf of the PAC.
- **Arthur Speck**, president of PMI, the respondent vendor substantially involved with the mailing list on behalf of the PAC and Ashcroft 2000; documentation shows that Mr. Speck was involved in various transactions regarding the mailing list.

- **Rosann Garber**, president of PLI; documentation shows that Ms. Garber served as the "list manager" for the mailing list and was involved in various communications regarding financial transactions involving the mailing list.

Based on information available to date, it remains unclear who from the Committee is most knowledgeable about the Committee's activities prior to Garrett Lott's involvement. Once we have determined who is the most appropriate person to speak with regarding the activities, we will submit a short report to the Commission recommending deposing that individual.

2. Additional Discovery

In addition to deposition subpoenas, this Office recommends approval of Subpoenas for the Production of Documents and Answers to Interrogatories to Eberle & Associates and Omega, which served as vendors regarding the mailing list.¹⁵ Attachment 6. This subpoena is similar to the subpoena that the Commission approved earlier for PMI and the subpoena recommended above for PLI.

This Office is also seeking to procure the services of a consultant experienced in the direct mail industry regarding political fundraising to provide expert advice and analysis. This Office needs to understand how mailing lists and the use of name and likeness are valued, in order to enable us to properly evaluate and analyze the evidence and transactions that occurred in this matter. Such information does not appear to be available through ordinary research or other resources. This Office is in the process of initiating preliminary discussions with a number of

¹⁵ This Office also will attempt to informally interview Bruce Eberle, chairman of Eberle & Associates and of Omega, regarding transactions related to the mailing list. If Mr. Eberle is unwilling to speak to us or it becomes necessary to take his statement under oath, we will circulate a short report to the Commission seeking deposition authority for Mr. Eberle.

1 direct mail vendors and consultants in order to ascertain whether such persons could provide the
2 analysis needed in this matter.

3 **D. Statute of Limitations**

4
5 The above-described Work Product Agreement between then-Senator John Ashcroft and
6 the PAC reflects an effective date of July 17, 1998. Other factors under investigation, such as
7 John Ashcroft's actual receipt of work product under the agreement, may ultimately show the
8 possible excessive contribution from the PAC to Ashcroft 2000 at a date later than the effective
9 date of the Work Product Agreement. Out of an abundance of caution, however, this Office is
10 currently treating July 17, 2003, as a potential statute of limitations date for the two committee
11 respondents in this matter.

12 **E. Motion to Dismiss**

13 PMI has asked in its responses that the Commission's reason to believe finding regarding
14 PMI be vacated and the matter be dismissed. Attachment 3, page 1 and Attachment 7. PMI
15 bases this request on its assertion that the Commission's Factual and Legal Analysis is incorrect
16 in its statement that Ashcroft 2000 rented a mailing list to PMI. PMI denies ever renting a
17 mailing list from Ashcroft 2000.

18 Neither the Act nor the Commission's regulations provide for such motions, or such
19 actions by the Commission at this point in the administrative process. See 2 U.S.C. § 437g and
20 11 CFR part 111. As noted above, these factual areas are the subject of ongoing investigation
21 including the proposed deposition of PMI president Arthur Speck.

22 After the investigation in this matter is concluded, this Office will make the appropriate
23 recommendation regarding PMI based on the overall information. This Office recommends that

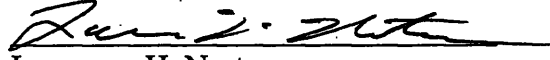
1 the Commission approve a letter to PMI explaining that the Commission will consider PMI's
2 liability at the appropriate time. Attachment 8.

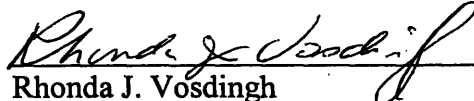
3 **IV. RECOMMENDATIONS**

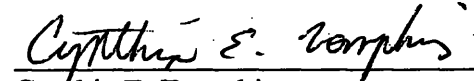
- 4
- 5 1. Find reason to believe that Precision List, Inc. violated 2 U.S.C. § 441b(a).
- 6
- 7 2. Approve the attached Subpoena for the Production of Documents and Answers to
- 8 Interrogatories to Precision List, Inc.
- 9
- 10 3. Approve subpoenas for the deposition of Garrett M. Lott, Jack Oliver, Arthur Speck,
- 11 and Rosann Garber.
- 12
- 13 4. Approve the attached Subpoena for the Production of Documents and Answers to
- 14 Interrogatories to Bruce W. Eberle & Associates, Inc. and Omega List Company.
- 15
- 16 5. Approve the attached letter to PMI regarding its motion that the Commission's reason
- 17 to believe finding be vacated and the matter be dismissed.
- 18
- 19 6. Approve the attached Factual and Legal Analysis.
- 20

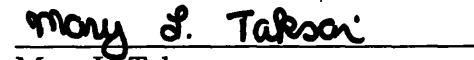
7. Approve the appropriate letters.


2/4/03
Date


Lawrence H. Norton
General Counsel


Rhonda J. Vosdingh
Associate General Counsel
for Enforcement


Cynthia E. Tompkins
Assistant General Counsel


Mary L. Taksar
Attorney


Mark Allen
Attorney

Attachments:

1. Work Product Agreement between John Ashcroft and Spirit of America PAC
2. List License Agreement between John Ashcroft and Ashcroft 2000
3. Documents relating to Precision Marketing, Inc.
4. Documents relating to Bruce W. Eberle & Associates, Inc. and Omega List Company
5. Subpoena for the Production of Documents and Answers to Interrogatories to Precision List, Inc.
6. Subpoenas for the Production of Documents and Answers to Interrogatories to Bruce W. Eberle & Associates, Inc. and Omega List Company
7. Precision Marketing, Inc. request that the reason to believe finding be vacated and the matter be dismissed
8. Letter to Precision Marketing, Inc. regarding its motion that the Commission's reason to believe finding be vacated and the matter be dismissed
9. Factual and Legal Analysis